United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7578

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P/S

In The

United States Court of Appeals

For The Second Circuit

EDWARD BRUCKER and DANIEL R. KAPLAN, as Trustees under the Trust Agreement dated November 15, 1968, made by WILTRUD E. GADBOYS, as Grantor, CECIL G. HUSKEY, E.T. STRATTON and NORTE & CO., a partnership composed of JOSEPH C. GALDI and RITA D. GALDI,

Plaintiffs-Appellees,

vs.

THYSSEN-BORNEMISZA EUROPE N.V., THYSSEN-BORNEMISZA, INC., THYSSEN-BORNEMISZA

(Continued on Reverse)

On Appeal from the United States District Court for the Southern District of New York.

REPLY BRIEF FOR APPELLANTS

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Defendants-Appellees.

WILLIAM B. WEINBERGER,

Plaintiff-Appellee,

vs.

RICHARD J. POWERS, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALLISTER, JOHN E. O'SULLIVAN, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, JAMES G. FERGUSON, THYSSEN-BORNEMISZA, INC. and INDIAN HEAD INC.,

Defendants-Appellees.

SHAMROCK CORPORATION, individually, and on behalf of all holders of Common Stock and Warrants of Indian Head Inc., similarly situated,

Plaintiffs-Appellees,

vs.

INDIAN HEAD INC.; THYSSEN-BORNEMISZA GROUP N.V.; THYSSEN-BORNEMISZA, INC.; WHITE, WELD & CO. INCORPORATED; RICHARD J. POWERS; JAMES E. ROBISON; HERBERT E. BACHRACH; GERALD B. HUISKAMP; L. EMERY KATZENBACH; MARSHALL F. SMITH; H.H. THYSSEN-BORNEMISZA; R.L. GENILLARD; THYSSEN-BORNEMISZA HOLDINGS, INC. and CHEMICAL BANK,

Defendants-Appellees.

APPEAL OF MORTON P. ROME AND MARJORIE T. ROME, TRUSTEES UNDER TRUST AGREEMENT MADE NOVEMBER 22, 1954, FOR THE BENEFIT OF SALLY P. ROME,

Objectors-Appellants.

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REPLY ARGUMENT

I. STANDARD OF REVIEW: DE NOVO REVIEW OF ERRORS OF LAW AND ABUSE OF DISCRETION

To fend off the contentions of Objectors, the principal theme upon which appellees dwell is that the District Court did not abuse its discretion in approving the "class action" settlement.

It cannot be gainsaid that in City of Detroit v. Grinnell Corporation, 495 F.2d 448, 455 (2d Cir. 1974), it was held that:

> "....this Court will intervene in a judicially approved settlement of a class action only when the objectors to that settlement have made a clear showing that the District Court has abused its discretion."

However, in Grinnell it must be noted that this Court also stated:

> "There is no allegation that the settlement conflicted with or was adverse to any class members' interest." (Id. at 465)

Here there is such an allegation, as well as Objectors' claims that there were clear errors of law.

The standard or scope of review by this Court with respect to the purely legal issues raised in this appeal is realistically, therefore, a de novo review of whether errors of law have been committed, whether or not such scrutiny be based upon the standard of clear "abuse of discretion."

It is from this viewpoint that Objectors contend that the threshold finding of the existence in this case of the class

action prerequisite required by Federal Rule 23(a)(4) was clearly and legally erroneous no matter what standard of review is applied.

On this aspect, the stark incontrovertible facts, untarnished by epithet, as shown in both the record and in appellants' original brief, is that we have here a stipulated "class action" settlement, before the class action existence was judicially determined, with the designated representative of Objectors' class being a party who was not a member of that class, yet as "protector" of that "class" bargaining for rights and benefits that, according to the representative protector and his attorneys, could rise no higher than those of the common stock class.[1/] But the common stock class representative was not then even a party to the litigation or the bargaining, and the orchestration of these negotiations, from Objectors' standpoint, was under the aegis of attorneys with multiple and differing interests.[2/] (Brief for Appellants pp. 26-37)

1/ In this connection if the Debenture holders rights could rise no higher than those of the common stock class the explanation as to why the Debenture holders who converted as part of the settlement received $.50 more per share than those who converted later is most puzzling, to say the least. (362a, fn.15)

2/ The Court is requested to take judicial notice of proceedings in the District Court subsequent to the filing of the appeal, in which the attorneys for the various plaintiffs in their squabble over their respective shares of the $600,000 fund for fees and expenses provided by the defendants on the settlement, made damaging cross charges concerning the inadequacies of the various class representatives and their attorneys.

In this posture this Court's teaching in Eisen II, 391 F. 2d 555 at 562 (2d Cir. 1965), that the threshold matter of the adequacy of representation prerequisite must be given careful scrutiny before a class action can be held to exist, Objectors contend, was disregarded.

The disregard of the settled principles that the party seeking to represent the class must be a member of that class and there must be no actual or potential adverse or multiple interests in the class representative or their attorneys bespeak error as a matter of law in the class action finding that Rule 23(a)(4) was complied with. It also makes out a clear showing that the required careful scrutiny concerning the existence of adequacy of representation was not heeded.

Thus the District Court's finding of the propriety of designating these actions class actions for purposes of settlement only (366a) was both erroneous as a matter of law as well as a clear abuse of discretion.

II. THE UNAUTHORIZED QUALIFICATION OF THE RULES ENABLING ACT, 28 U.S.C., §2072, as amended

In a series of recent opinions over the past few years the majority of the Supreme Court has taken a strong stand against extensions of federal statutes and rules by judicial interpretation. This policy message is a common link or thread which permeates the

following cases: Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (nullifying advances or broadening in class actions); United Housing Foundation v. Forman, 421 U.S. 837 (1975) (economic reality determines what is a "security" under the 1933 and 1934 federal securities laws); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (no judicial extension of the purchaser-seller doctrine of Birnbaum[3/]); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (judicial addition to operative language of the 1934 securities law rejected); Piper v. Chris-Craft Industries, Inc., 45 LW 4182 (U.S. 1977) (judicial interpretation of creation of implied cause of action not necessary to effect goals of Williams Act); Sante Fe Industries, Inc. v. Green, 45 LW 4317 (U.S. March 23, 1977) (expansion by construction of Sec. 10(b) and Rule 10b-5 to apply to short form mergers authorized by state statutes impermissible).

These policy messages of the Supreme Court have direct applicability to this appeal because the District Court's judgment and order directly involve a judicial qualification, if not a complete erosion, of the Rules Enabling Act, 28 U.S. §2072, as amended.

Just as the rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make laws and cannot extend the power granted by

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3/ Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952)

Congress, so too Objectors submit that the rulemaking power granted by Congress to the Supreme Court and exercised in the promulgation of the Federal Rules of Civil Procedure did not confer under those rules power to make interpretive determinations that abridge, enlarge or modify substantive rights created by federal or state law, let alone rights protected by the U.S. and state constitutions and the Rules Enabling Act itself.

Yet, Objectors submit, this is the exact effect of the judgment and decree of the District Court now appealed.

There is no blinking the fact that approval of the stipulated "class action" settlement worked a clear alteration of Objectors' substantive rights. At the least the District Court's judgment changed without their affirmative consent their several contract rights to convert their Debentures into common stock to simply a right to convert into a fixed cash sum. The District Court judgment and decree permanently enjoined Objectors from independently prosecuting their own petition for redress of grievances, one of the most fundamental and substantive of rights, all without adequate notice, hearing, trial on the merits or a showing of irreparable harm.

The Rules Enabling Act, 28 U.S.C. §2072, as amended, contains no qualification that it is perfectly proper for substantive, let alone constitutional, rights to be altered or modified by

operation of rules of procedure so long as such alteration is effected by judicial interpretation.

Furthermore, nothing in the Act authorizes the alteration of substantive rights due to their possessors' failure to act affirmatively to preserve those rights (pursuant to Fed. R. Civ. P. 23(c)), particularly where their individual contracts imposed no such obligation to act.

As Ernst & Ernst, supra, makes clear, the starting point in every case involving construction of a statute is the language itself. Id. at 197, quoting Blue Chip Stamps, supra, at 756. The explicit and unambiguous language of the Rules Enabling Act clearly shows that any interpretation and construction of that statute does not permit such qualification. Nonethelss the effect of the judgment and decree appealed adds these qualifications to the Enabling Act, and thus in reality erodes the effect of that statute.

This, Objectors contend, is clearly error of law and an abuse of discretion.

One final point should be made on what Objectors contend was, by the settlement and its approval, an unauthorized qualification of or exemption from the Rules Enabling Act.

The long and the short of this "class action" settlement was that the defendants were simply buying from plaintiffs res

judicata to achieve maximum protection and absolution for the money they were willing to pay, including $600,000 for plaintiffs' attorneys' fees and expenses. They insisted, and the "class representatives" and their attorneys acceded, in the naked attempt to buy an exemption from the Rules Enabling Act. But the Rules Enabling Act provides for no exemption in its interdiction that prevents alteration of substantive rights. Just as public policy precludes indemnification from e.g., violation of the federal securities laws (Globus v. Law Research Service, Inc., 418 F.2d 1276 (2d Cir. 1969), cert. denied 397 U.S. 913 (1970)), so too public policy should preclude purchase of an exemption from the Rules Enabling Act. Nor should such escape hatch of absolution be able to be procured by means of permanent injunctive relief under the circumstances that were utilized in this case.

III. THE ARGUMENT OF MOOTNESS IS WITHOUT MERIT

Another argument made by plaintiffs is that this appeal should be dismissed as moot (Brief for Plaintiffs at 35) because sizable proceeds of the settlement have been distributed to the debenture, stockholder, and warrant classes. This contention betrays plaintiffs' misconception of the doctrine of mootness. The inability of the federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964); DeFunis v. Odegaard, 416 U.S. 312 (1974). When a controversy has "clearly ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests'" (DeFunis, 416 U.S. at 317), a case is deemed to be moot. So, too, if there is no relief that the court can provide that can aid the party seeking relief, the case is considered moot. Flory v. Federal Communications Comm'n, 528 F.2d 124, 127-28 (C.A. 7, 1975). But this appeal presents neither of the above criteria. Whether the settlement funds are or are not disbursed has no bearing on whether the District Court's approval of the class action, the settlement, and the merger constituted either error as a matter of law or an abuse of discretion. The dispersal of moneys depends on the actions of the parties, not on the propriety of the settlement. The issues we seek to have resolved here, we believe, are "definite and concrete" ones, and do not become less so because moneys

have been distributed. So too, the fact that a distribution has been made in no way curtails the power of this Court to grant the relief sought in this appeal (see our opening brief at 66). This is not a seizure and forfeiture action, in which distribution of the res will render judicial review futile. Effective relief can be ordered, namely, a remand with instructions to disapprove the settlement.

We submit that acceptance of plaintiffs' contention of mootness could result in parties to any compromised litigation acting in haste to distribute the settlement proceeds and thereby deny judicial review. This Court should not countenance such a procedure.

(It is worth noting that if a case becomes moot during the pendency of an appeal, the proper procedure is not--as plaintiffs contend (Brief at 35)--to dismiss the appeal, but instead is to remand with instructions to vacate the judgment entered below. Dennis, supra at 320; United States v. Munsingwear, Inc., 340 U.S. 36, 41 (1950). If this indeed is what the plaintiffs want, then upon vacation of the judgment below, the settlement becomes a nullity.)

IV. THE GREEN CASE REVISITED

The Supreme Court's decision in Santa Fe Industries, Inc. v. Green, supra, relegated relief in a short-form merger where there is no deception to traditional state remedies and state law.

> "Absent a clear indication of Congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overriden."

45 LW at 4322.

Yet the very effect of this class action settlement is to impair and abridge the state contract rights of Objectors' Debentures and violate applicable state statutes and common law (Objectors' opening brief at 57-63).

V. THE ISSUES WE RAISE ARE SUBSTANTIAL AND MERITORIOUS

Plaintiffs' ad hominem arguments culminate in a suggestion that our appeal is "frivolous or vexatious." (Brief at 40, n.21). Contrary to this claim, however, the issues raised here are not only serious and substantial, but, in Objectors' submission, are meritorious as well. The cases to which plaintiffs refer the Court at pages 40-41 of their brief all involved flagrantly egregious conduct by the parties upon whom costs or sanctions were imposed. To equate Objectors' contentions with such vexatious conduct is in effect to attempt to suppress the right to appear and object, although an invitation to such effect was extended in the notice of proposed settlement (579a and 584a).

CONCLUSION

For the reasons stated in our opening brief and in this reply brief, the judgment of the District Court should be vacated in its entirety, including without limitation, dissolving the order granting the permanent injunction contained therein,

and the additional relief prayed for in the briefs for appellants should be granted.

Respectfully submitted,

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Dated: April 22, 1977.

CERTIFICATE OF SERVICE

Re: 76-7578
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STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Appellants.

That on the 22nd day of April , 1977, I served the within

Reply Brief for Appellants

in the matter of Edward Brucker, etal v. Thyssen-Bornemisza Europe, etal

upon (See attached list)

by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 22nd day
of April 1977.

Mildred W. Saas
A Notary Public of the
State of New Jersey.

MILDRED W. SAAS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires February 2, 1978

No. 76-7578 - BRUCKER V. THYSSEN-BORNEMISZA, etal

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